

VIA ELECTRONIC MAIL AND HAND DELIVERY

Date: November 9, 2006

To: Elleanore Daub
Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23219
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TIME STAMP HERE
UPON DELIVERY:

From: Joseph J. Tannery, Esq.
Chesapeake Bay Foundation
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Re: Reasonable Grounds to Conduct an Aquatic Life Use Attainability Analysis

Dear Ms. Daub:

Please accept this letter as formal public comment from the Chesapeake Bay Foundation ("CBF") regarding a request by the Virginia Coalfields Total Maximum Daily Load Group ("Group") to conduct an aquatic life Use Attainability Analysis ("UAA") for Straight Creek in Lee County, Virginia. Pursuant to §62.1-44.19:7 of the Code of Virginia, any aggrieved party may present to the State Water Control Board ("the Board") reasonable grounds indicating that the attainment of the designated use for a water body is not feasible.¹ After sufficient public notice and a 30-day public comment period, the Board, in its administrative discretion, may allow the aggrieved party to conduct a UAA in compliance with the Clean Water Act ("CWA") and its regulations.

¹ If an aggrieved party presents to the Board reasonable grounds indicating that the attainment of the designated use for a water is not feasible, then the Board, after public notice and at least 30 days provided for public comment, may allow the aggrieved party to conduct a use attainability analysis according to criteria established pursuant to the Clean Water Act and a schedule established by the Board. If applicable, the schedule shall also address whether TMDL development or implementation for the water should be delayed. (§62.1-44.19:7 of the Code of Virginia)

Pursuant to documents received from the Group, the Department of Environmental Quality (“DEQ”) issued a Notice of Public Comment Period on October 5, 2006. The Board now seeks comment on the sufficiency of the documentation submitted by the Group and specifically the Board seeks comment on whether the documentation received by the Group constitutes “reasonable grounds” that attainment of the aquatic life use for Straight Creek is not feasible.

Water quality protection and restoration is a cooperative process that requires concerted action by citizens, industry, and government. To that end, CBF would like to take this opportunity to provide comments addressing the Group’s attempt to document “reasonable grounds”. In general, UAA’s are expensive undertakings, thus moving forward with a UAA that does not adequately address federal and state requirements, the concerns of stakeholders, and the needs of the general public may result in large costs for the Group while providing the Group with little or no benefit. CBF believes our comments may help the Group, other stakeholders, regulatory agencies, and the general public to understand the issues presented by a UAA request. Moreover, CBF wishes to provide comments that will help all those involved to identify opportunities for collaboration and cooperation, as well as minimize costs and time, in restoring Virginia’s water quality. At this time, CBF would like to thank the Board and the DEQ for this opportunity to provide information and voice our concerns.

BACKGROUND

The Straight Creek Watershed is located in Lee County in southwestern Virginia. Straight Creek is a tributary to the Powell River in the Tennessee/Big Sandy Basin. The benthic impairments on Straight Creek extend 6.66 miles from its headwaters to its mouth. The watershed is rural with forested lands making up 91 percent of the watershed area. However, the area has been intensively mined, by members of the Group as well as others, in the past and these operations continue.

In response to Section 303(d) of the CWA, the Virginia Department of Environmental Quality (DEQ) listed Straight Creek on Virginia’s 1996 Section 303(d) list as being unable to attain the general water quality standard due to an aquatic life use impairment identified through benthic assessments.

The Clean Water Act (CWA) requires the development of a Total Maximum Daily Load (TMDL) for those bodies of water identified as impaired by a State where technology-based and water-quality based controls will not provide for attainment of water quality standards. A TMDL is a determination of the amount of pollutant from point, nonpoint, and natural background sources, including a margin of safety, that may be discharged to a water quality-limited water body. Implementation of the TMDL is designed to allow the impaired water to achieve its designated use and restore a healthy aquatic community.

During the 2006 Session of the Virginia General Assembly, CBF was contacted by DEQ and legal counsel for the Group to work cooperatively to develop a means by which private industry could finance and conduct a UAA on its own. Prior to the enactment of this law, only the Commonwealth itself could conduct a UAA. Industry counsel explained that DEQ was constrained by financial resources, therefore private parties, such as the Group, wished to facilitate the scientific studies of a UAA by hiring and paying consultants to complete the necessary work. CBF was assured that any privately researched UAA would be subjected to full review by DEQ, the Environmental Protection Agency (“EPA”), and the public. Additionally, industry counsel assured CBF that this proposed change in the law would not be used as a means to impose unnecessary delays upon the formulation or implementation of Total Maximum Daily Loads (“TMDLs”).

The final law is written such that private parties may petition the Board for permission to conduct a UAA, however the law does not entitle private parties to conduct UAA’s even where reasonable grounds were presented. Upon receipt and notice of a private party request, the law requires the commencement of a 30-day public comment period. In the view of CBF, the purpose of this public comment period is to afford an opportunity to public to examine and scrutinize the sufficiency of the evidence presented by private parties so as to prevent unnecessary and unwarranted UAA’s. The proposed law also vests the Board with full administrative discretion to approve or deny the private party request for a UAA. This law is specifically written such that a request and/or authorization to conduct a UAA will not automatically delay the development or implementation of an approved TMDL. Finally, CBF has been assured by Group counsel that any privately conducted UAA must win the ultimate approval of the EPA, DEQ, and go through the full rigors of a complete rulemaking process under the Virginia Administrative Procedure Act.

STATEMENT OF INTEREST

Founded in 1967, CBF is the only independent 501(c)(3) organization dedicated solely to restoring and protecting the Chesapeake Bay and its tributaries. With the support of more than 140,000 members, CBF works to provide a restored Bay with healthy rivers and clean water; sustainable populations of fish and shellfish; thriving water-based and agricultural economies; and a legacy of success for our children and grandchildren. The mission of CBF is to restore and sustain the Bay’s ecosystem by substantially improving the water quality and productivity of the watershed, with respect to water clarity, resilience of the system, and diversity and abundance of living resources, and to maintain a high quality of life for the people of the Chesapeake Bay region.

CBF recognizes that Straight Creek in Lee County, Virginia is well outside the Chesapeake Bay Watershed and its tributaries. However, this is the first ever request for a privately conducted UAA in the Commonwealth and the first test of the newly enacted

§62.1-44.19:7 of the Virginia Code. Additionally, it must be noted that this request to conduct a private party UAA is in fact an attempt to lower a water quality standard in the Commonwealth. While this particular request pertains only to Straight Creek, the eventual resolution of the legal, scientific, and factual issues presented to the Board by this request will undoubtedly set precedent for all future attempts to lower water quality standards in the Commonwealth.

CBF is well aware that a UAA was conducted in conjunction with the development of the partial TMDL established for the Chesapeake Bay Watershed. Accordingly, it may seem that the water quality of the Bay is insulated from designated use challenges. However, the partial TMDL established for the Bay, only applies to the tidal reaches of Bay tributaries leaving non-tidal tributaries open to designated challenges similar to the one now occurring in Straight Creek. Furthermore, the waste load allocations assigned in the Bay are the result of a partial TMDL. Should the Commonwealth fail to achieve the goals of the Chesapeake Bay 2000 Agreement and the American Canoe consent order, the Bay will likely face the implementation of a full TMDL. At such time, the Bay itself could be subjected to a designated use challenge.

Designated uses are essential to effective implementation of the CWA as a whole. The “use” of a water body is utilized by the Commonwealth to establish water quality standards and water quality-based effluent limits. Essentially, all water quality-based protections established by the CWA follow from a water body’s designated use. If designated uses supporting the water quality goals of the Nation and the Commonwealth are downgraded, the true potential of a water body may never be realized as pollution will continue to accumulate. As a consequence, a valuable natural resource of the Commonwealth may be lost forever.

CBF recognizes that up to this point our organization has not been involved in the development, approval, and implementation of the Straight Creek TMDL. CBF has not submitted comments nor participated in the Straight Creek TMDL either formally or informally. CBF only seeks to provide comment now due to the fact that the current challenge of the designated use initiated by the Group in Straight Creek will set the rules for all future challenges of designated uses and water quality standards across the Commonwealth. Among other things, this challenge will set the bar for the amount and quality of evidence needed to establish “reasonable grounds”. Additionally, this challenge will determine whether a private party UAA can delay the implementation of an approved TMDL. In order to resolve these legal, scientific, and factual issues that will likely set statewide precedent for all designated use challenges, including those that could ultimately address water quality standards in the Bay, CBF finds it necessary to submit comments on the Group’s request for a private party UAA in Straight Creek.

Once again CBF appreciates this opportunity to provide comments. We look forward to working with all parties and persons interested in this request for a private party UAA.

SUMMARY OF MAJOR CONCERNS AND COMMENTS:

- 1. DESIGNATED USES ARE THE BACKBONE OF ALL WATER QUALITY-BASED PROTECTIONS IN THE COMMONWEALTH.**
- 2. CHANGES IN DESIGNATED USES MAY CAUSE IRREVERSIBLE WATER QUALITY CONSEQUENCES.**
- 3. THE GROUP FAILS TO QUALIFY AS AN AGGRIEVED PARTY UNDER VIRGINIA LAW.**
- 4. THE GROUP MUST BE REQUIRED TO MEET A STRINGENT STANDARD OF EVIDENCE, BOTH IN QUANTITY AND QUALITY OF EVIDENCE, WHEN DEMONSTRATING “REASONABLE GROUNDS” FOR UNATTAINABILITY.**
- 5. THE GROUP FAILS TO PROVIDE ADEQUATE AND OBJECTIVE EVIDENCE TO JUSTIFY THE APPROVAL OF A UAA.**
- 6. DETERMINATIONS BY THE BOARD OF FACTUAL AND EVIDENTIARY ADEQUACY OF THE GROUP’S “REASONABLE GROUNDS” DOCUMENT WILL SET THE PRECEDENT FOR ALL FUTURE DESIGNATED USE CHALLENGES IN THE COMMONWEALTH.**
- 7. THE COMMONWEALTH HAS A DUTY TO PROTECT AND RESTORE WATER QUALITY AND CANNOT GIVE UP ON RESTORING WATER BODIES HELD IN THE PUBLIC TRUST.**
- 8. THE GROUP’S REASONABLE GROUNDS DOCUMENT IGNORES THEIR OWN CONTRIBUTIONS TO THE DEGRADATION OF STRAIGHT CREEK.**
- 9. UNDER THE LAWS OF VIRGINIA, THE COMMONWEALTH IS UNDER NO OBLIGATION TO MOVE FORWARD WITH A REQUEST FOR A UAA.**

10. WHERE CONFLICTS OF INTEREST EXIST THE COMMONWEALTH SHOULD CONDUCT THE UAA.

1. DESIGNATED USES ARE THE BACKBONE OF ALL WATER QUALITY-BASED PROTECTIONS IN THE COMMONWEALTH.

Water quality standards are the laws and regulations established by a state to achieve the water quality goals of the Clean Water Act. Water quality standards are established by first specifying, or “designating” the use or uses of a specific water body. Once the state designates a use, the state is then required to adopt water quality criteria, expressed in terms of numerical values or narrative criteria, to protect its designated uses. The resulting water-quality based effluent limits are codified as the state’s water quality standards.

As detailed above, the establishment of a designated use in each water body is the cornerstone of water-quality based protection under the CWA. States can only develop enforceable criteria, or limits, to ensure that water quality is restored or maintained in its waters by first designating the uses of all waters within the state. Consequently, CBF is concerned by any attempt to alter designated uses in such a manner as to lower water quality standards in the Commonwealth.

2. CHANGES IN DESIGNATED USES MAY CAUSE IRREVERSIBLE WATER QUALITY CONSEQUENCES.

A UAA is a structured scientific assessment of the factors affecting the attainment and uses of a water body, such as swimming, fishing, drinking, and aquatic life. A UAA is a tool used to evaluate the potential to remove or lower non-existing and non-attainable designated uses. The results of a UAA must be adopted into the water quality standards and be approved by the EPA as meeting the CWA and the Endangered Species Act (“ESA”).

UAA’s are used to change the designated use of water body. In Virginia, all water bodies are designated, among other uses, for the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them. This aquatic use designation sets the goal that all of the impaired waters should be restored such that people can swim, fish, recreate, and enjoy the aquatic life of our waters. A UAA can be used to establish less stringent protections for a water body in Virginia. The need and benefit of removing or lowering a designated use through UAA is

only as valuable as the data and science used in the UAA process. Should biased or skewed data be allowed to serve as the basis for lowering or removing a designated use, the health of all the waters in Virginia are placed in serious jeopardy?

All of the water quality-based protections established by the CWA follow from the designated use of a water body. If a “fishable/swimmable/aquatic life” use is downgraded based on inadequate information, biased or superficial analysis, water quality-based protections that might have enabled the water to achieve the goals articulated by Congress in the CWA may never be put in place. As a result, the true potential of the water body may never be realized, and a resource highly valued by our Congress and the public may be lost forever.

3. THE GROUP FAILS TO QUALIFY AS AN AGGRIEVED PARTY UNDER VIRGINIA LAW.

The term “aggrieved party” as used in §62.1-44.19:7 is a legal term of art. The term “aggrieved” does not equate to a party that is merely “upset” about one thing or another. Instead, the term is used to denote a party that has been denied some legal or equitable right. A party may also qualify as “aggrieved” where that party has had some burden of obligation imposed upon them that is different from that suffered by the general public. The Group seeking a private party UAA fails to qualify under either of these two definitions of an aggrieved party.

CBF can only conclude that the Group considers itself an “aggrieved party” under the law because of the recent TMDL proposed for its watershed. CBF would like to know what specific legal rights the Group sees that the TMDL infringes upon. Please keep in mind there is no absolute right to pollute under the laws of Virginia. Likewise, CBF is questions the burden the Group faces under a TMDL that others will not carry. TMDLs call for the reduction of pollution from all sources, both point and nonpoint. Additionally, CBF would like to point out that the restoration of the waters of the Commonwealth places burdens and obligations upon us all.

For the above reasons, CBF does not believe that the Group qualifies as an “aggrieved party” under §62.1-44.19:7, however, for the remainder of our comments CBF will assume for the sake of argument that the Group is an “aggrieved party”.

4. THE GROUP MUST BE REQUIRED TO MEET A STRINGENT STANDARD OF EVIDENCE, BOTH IN QUANTITY AND QUALITY OF EVIDENCE, WHEN DEMONSTRATING “REASONABLE GROUNDS” FOR UNATTAINABILITY.

Pursuant to §62.1-44.19:7 of the Code of Virginia, if the Board finds that the Group has in fact presented “reasonable grounds” indicating that the attainment of the

designated use for a water body is not feasible, the Board may allow the private party to conduct a UAA, subject to the review of the Board, the EPA, and the public. The civil evidentiary standard of “reasonable grounds” is most akin to the criminal evidentiary standard of “probable cause”. Under the Fourth Amendment of the Constitution of the United States, probable cause amounts to more than a bare suspicion of a crime, but less evidence that would justify a conviction. By this analysis, a presentation of “reasonable grounds” should amount more than a suggestion of unattainability, however something less than a show of unattainability by a clear and convincing proof.

- ? *Taking into account the presumption of attainability in the CWA regulations, CBF believes that within of continuum of the “reasonable grounds” standard of evidence, the Group must be required to provide a level of evidence that more closely approximates clear and convincing proof of unattainability.*

The level of evidence required to present “reasonable grounds” of unattainability is further complicated by a presumption of attainability contained in the regulations implementing the CWA. When establishing water quality standards, the CWA requires the states to adopt standards that protect the public health and welfare, enhance the quality of water *and* serve the purposes of the Clean Water Act. The primary purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters through the reduction and eventual elimination of the discharge of pollutants. To that end Congress declares in Section 101(a) of the Clean Water Act that, where attainable, the states must seek “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” Simply restating, states must develop water quality standards that provide for fishable/swimmable/aquatic uses, wherever such uses are attainable.

While the language in 101(a) alone does not create a rebuttable presumption that fishable/swimmable/aquatic life uses are always attainable, the intent of Congress to create a preference for fishable/swimmable/aquatic life uses is clear. The implementing regulations of the CWA found in 40 C.F.R. 131.10, however, clearly indicate a rebuttable presumption of fishable/swimmable/aquatic life use attainability. Section 131.10(j) of the Code of Federal Regulations provides that a state must conduct a use attainability analysis anytime the state fails to designate a water body for fishable/swimmable/aquatic life uses. Conversely, the following code section, Section 131.10(K), clearly provides that a state is not required to conduct a use attainability analysis whenever the state designates fishable/swimmable/aquatic life uses. The net effect of these two provisions is to require that water quality standards provide for fishable/swimmable/aquatic life uses unless those uses have been shown by a UAA to be unattainable. Thus, unless and until, the fishable/swimmable/aquatic life goal of the CWA is conclusively demonstrated to be unattainable in a water body, the CWA requires the states to make their water quality-based effluent limits protective of the fishable/swimmable/aquatic life uses.

This presumption of attainability is consistent with Congress's express directive that water quality standards protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. Undeniably, one of the overarching purposes of the CWA is to achieve fishable/swimmable/aquatic life uses wherever attainable. Thus, although Congress recognized that the achievement of fishable/swimmable/aquatic life uses will not always be possible, it clearly indicated an intent that the states move toward more protective water quality standards to preserve the nation's waters for human uses, as well as for aquatic life. Consequently, any contemplation of a downgraded designated use deserves a high level of scrutiny. Accordingly, CBF concludes that, given the importance of the fishable/ swimmable/ aquatic life use and the presumption for attainability, a somewhat higher level of evidence must be imposed upon the Group. Taking into account the presumption of attainability, CBF believes that within of continuum of the "reasonable grounds" standard of evidence, that the Group must be required to provide a level of evidence that more closely approximates clear and convincing proof of unattainability. Essentially, the regulations of the CWA provide presumptive evidence of attainability that should be deemed true and sufficient unless the Group can overcome such evidence.

? *CBF requests the Board to require the Group to base its case for "reasonable grounds" upon objective, factual evidence.*

Finally, a presentation of "reasonable grounds" must be based on objective and factual evidence. Once again looking to the criminal standard of "probable cause", we find that sufficient evidence to meet the standard must be based on objective evidence and not upon a subjective belief. In the case of a criminal arrest, a police officer cannot establish probable cause simply by showing that he subjectively believed he had grounds to make an arrest. If subjective good faith alone were enough to satisfy the standard, then determinations our rights under the Fourth Amendment would lie solely within the discretion of the police. Likewise, a presentation of "reasonable grounds" should be based upon objective evidence. The Board cannot rely solely upon the subjective opinions and suspicions of the Group in this matter. To do so would allow the Group to dictate the required level of sufficient evidence. CBF implores the Board to require the Group to base its case for "reasonable grounds" upon objective evidence. Preferably, the aggrieved party should use factual, documentary evidence that can be verified by both the Board and the public

5. THE GROUP FAILS TO MEET THE BURDEN OF PROOF REQUIRED TO JUSTIFY THE APPROVAL OF A UAA.

In section 2.0 of the "reasonable grounds" document presented by the Virginia Coalfields Total Maximum Daily Load Group, the Group sets forth the basic laws in the Code of Regulations which govern changing designated uses and performing UAAs. Here, the Group succinctly sets out what CBF sees as a three part test to determine whether a UAA is warranted. The three prong test is as follows: (1) Are downstream uses

and water quality uses protected if the use in Straight Creek is lowered; (2) Is the cause of impairment natural and can the impairment be controlled by available, affordable pollution control measures and; (4) Is the use is not an “existing use”. In order to show that the attainment of the current designated use is not feasible, the Group must provide, at a minimum, reasonable grounds for all three prongs. Applying this three prong test, CBF asserts the Group has failed to meet the burden of proof necessary to warrant a UAA.

? CBF finds that the Group fails to present reasonable grounds that downstream water quality standards will be protected.

In section 2.2, the Group notes that federal regulations require the designated use of a stream to maintain all downstream water quality standards. Yet, the reasonable ground document is bereft of any evidence on this issue. The Group merely offers that a UAA will ensure those uses are protected. CBF wonders why the Group should be allowed to go forth with a UAA when there is no hint of information about the impact on downstream uses. Obviously, the Group has failed to present reasonable grounds as to the first prong of the test. At this time, CBF would like to note that the immediate downstream segment of river from Straight Creek, the North Fork Powell River has a benthic impairment from its confluence with Straight Creek downstream to the Powell River listed on the EPA’s 303(d) list of dirty waters since 1994. Any attempt to downgrade the current use of Straight Creek would further jeopardize the health of these downstream waters. It goes without saying that if Straight Creek waters continue to be impaired for benthics, they will likely impede the recovery of the benthic impairment downstream in the North Fork Powell.

? CBF finds that the Group fails to offer any credible evidence on whether the source of impairment is natural or if the impairment can be controlled by available and affordable pollution controls.

As to the second prong of the test, CBF again finds that the Group fails to offer any credible evidence on whether the source of impairment is natural or if the impairment can be controlled by available and affordable pollution controls. The Group’s document states that “some of the poor habitat may be due to human activity, but some may be due to natural conditions of the stream.” However, no natural physical conditions are cited. The natural conditions impacting the stream must be specifically listed and at least explained in enough detail so as to give the Board justification for a private party UAA.

The Group attempts to touch on some of the affordability issues in section 3.7. The Group notes, “If such [water quality improvement] measures cannot be afforded by a municipality or local economy, then they are not realistically achievable.” First, CBF wishes to point out that this statement is inaccurate. Affordability is not tied only to the means of municipality or local economy. Instead, affordability takes into account funding from state, federal, and private sources. Second, the Group gives us no evidence that

water quality improvement measures are unaffordable. Instead, the Group only gives us extreme examples of questionable probability. CBF must point out that the EPA has found the water quality improvement measures of Straight Creek TMDL to be appropriate in the Implementation Plan document. Again, the Virginia Coalfields Group has failed to carry its burden of proof.

? *CBF finds that “reasonable grounds” document presented by the Group fails to provide adequate and objective evidence of either the existence or non-existence of “existing uses”.*

On the third prong, CBF finds that “reasonable grounds” document presented by the Group fails to provide adequate and objective evidence of either the existence or non-existence of “existing uses” in Straight Creek. The document correctly points out in Section 2.4 that in order to be eligible for removal a designated use must not be an “existing use”. However, the Group neglects to provide even one shed of data to prove that the current use was not attained on or after November 28, 1975. The Group merely states the obvious that a UAA will determine the existing use. Elsewhere in the document the Group mentions anecdotal knowledge of heavy mining and timber activity in the area prior to 1975. Yet, no specific data, literature, or other documentary evidence as to the water conditions has been provided. CBF expects that there must be some data the Board can use to assess the likelihood of whether the use was or not existing in 1975. Pure anecdotal accounts of mining prior to 1975 do little to substantiate the need for a UAA. Even statements as to the existence of larger population in Lee County prior to 1975, fail to get at issue of when the tipping point may have occurred, if any, that prevented a fishable/swimmable /aquatic use qualifying as an existing use.

The prevalence of “existing uses” is the seminal, threshold question that must be answered before any designated use can be removed or downgraded. Without a presentation of reasonable grounds that the use is not an existing use, the Group fails to carry the necessary burden of proof set out under the Code of Virginia. As a result, CBF finds that the Group fails the final prong of the three prong test set out above.

In Section 3.0, the Group attempts to enumerate “factors justifying use change”. First, CBF would like to comment that this section, while making some literature references, lacks of documentary evidence on the whole and largely consists of subjective opinions. Essentially, the evidence presented in Section 3.0 amounts to nothing more than a subjective hunch that the designated use needs lowering. Additionally, CBF finds that the Group often invokes the worst case scenario possible in a thinly veiled attempt at scare the public. In reality, few if any of the consequences suggested by the Group would ever come to fruition. The Group suggests that homes, roads, and bridges would have to be uprooted and moved in order to meet the current designated use. However, the TMDL proposed for Straight Creek, approved by both DEQ and EPA, makes it plainly clear that the designated use of the creek can be attained without such drastic measures.

Overall, CBF finds the Group's document to lack basic facts and data needed to complete a stand-alone argument to justify the need for a UAA. We find only general statements and an absence of hard, scientific data.

6. DETERMINATIONS BY THE BOARD OF FACTUAL AND EVIDENTIARY ADEQUACY OF THE GROUP'S "REASONABLE GROUNDS" DOCUMENT WILL SET THE PRECEDENT FOR ALL FUTURE DESIGNATED USE CHALLENGES IN THE COMMONWEALTH.

As mentioned in our Statement of Interest, CBF firmly believes that many, if not all, the determinations made by the Board during this request for a private party UAA will become the rule by which all future requests and private party UAA's will follow. It is with this fact in mind that CBF implores the Board to move extra cautiously and deliberately. Given the importance of the decisions that will be made once a private party UAA is completed, we respectfully request the Board to set a high bar for the amount and quality of evidence a private party supplies in order to obtain approval to conduct a UAA. CBF worries that once the wheels of a private party UAA are set in motion without sufficient justification that irreversible consequences may occur from which the waters of the Commonwealth may never recover.

CBF understands that a UAA will contain a full presentation of facts and scientific analysis and we are not advocating for the Group, or any private party, to complete a full UAA just to prove reasonable grounds. CBF, instead, requests that the private party provide an appropriate level of factual information necessary to negate the rebuttable presumption for aquatic use attainability and provide the Board with due cause to contemplate a diminution of the resources protected by the public trust.

7. THE COMMONWEALTH HAS A DUTY TO PROTECT AND RESTORE WATER QUALITY AND CANNOT GIVE UP ON RESTORING WATER BODIES HELD IN THE PUBLIC TRUST

The theory of the public trust is an ancient legal doctrine. It evolved from Roman law into English common law, and was passed on to the American colonies. The public trust doctrine refers to the duty of sovereign states to hold and preserve certain resources, including wildlife, for the benefit of its citizens. Described simply, the doctrine provides that natural resources belong to the whole public and the public lands, waters, and other resources are held in trust by the government for the benefit of all its citizens. The state's role as sovereign over trust waters imposes certain environmental duties that it owes to the public. Under the public trust doctrine, the state may not destroy or relinquish these duties except under certain, very narrow circumstances. Although states have broad discretion implementing the public trust, states are not free to sign over or destroy the trust.

Here in Virginia, the public trust doctrine is has been codified in the state Constitution. Article XI of the Constitution of Virginia makes it the policy of the Commonwealth to protect its atmosphere, lands and waters from pollution, impairment or destruction for the benefit, enjoyment and general welfare of the people of the Commonwealth.² To that end all officers and representative of the Commonwealth swear a solemn oath to protect the waters and the living resources for the benefit of all citizens. Thus, the public trust doctrine is no longer just an ancient common law doctrine. It is a living breathing law in our Commonwealth that must be supported and defended. Consequently, the Commonwealth should not abandon goals to restore and maintain waters such they may be used for fishing, swimming, and the support of aquatic life. A relinquishment of these goals would amount to an abandonment of the state's role as a trustee over the waters held for the benefit of all citizens.

The watershed surrounding Straight Creek is a largely rural area with forested lands making up 91% of the watershed area. Currently, permitted mining in the watershed makes up 7% of the land area and urban lands less than 1%. Additionally, the population of the watershed was only 1353 people in the year 2000. Should the Commonwealth abandon, or allow a private party investigation into the abandonment of the fishable, swimmable, and aquatic uses in this lightly populated, heavily forested area without sufficient justification, CBF fears there is little hope in maintaining water quality standards elsewhere in the Commonwealth. Especially, in areas more densely populated, heavily industrialized, and highly urbanized than the Straight Creek watershed.

Environmental regulation requires a delicate balance between the needs of different members of the Commonwealth. However, there comes a point where the benefit to the general welfare created by restoring water quality for the current and future generations, should outweigh the need the appease those who have polluted and continue to pollute our rivers and streams.

8. THE GROUP'S REASONABLE GROUNDS DOCUMENT IGNORES THE GROUP'S CONTRIBUTIONS TO THE DEGRADATION OF STRAIGHT CREEK.

The Group's "reasonable grounds" document often attempts to attribute much of the Straight Creek water quality impairment to residential development, thereby deflecting ownership for many pollution problems in Straight Creek. The Group attempts to do so despite the fact that only around 1353 people live in a watershed that is less than 1% urbanized. The fact of the matter is that mining operations in the area, including operations owned by members or parent members of the Group, have caused several breaches and spills of pollutants into Straight Creek over the past decade. In the Straight Creek TMDL report EPA Region III acknowledges four significant pollution events in

² Constitution of Virginia, Article XI

the past nine years related to mining operations and activities that may have played a significant role in the depression of the benthic community in Straight Creek.

An EPA Region press release issued on November 1, 1999 provides a grave look into the effects on Straight Creek in one of these significant pollution events.³ EPA notes in the press release that:

“The second mine spill occurred on October 24, 1996. Contaminated water leaked from the huge slurry impoundment at approximately 3,000 gallons a minute. The contaminated water – containing suspended solids, iron, and manganese – flowed approximately 11 miles through Gin Creek, Straight Creek, and into the North Fork Powell River, polluting a total of 50 miles of stream.”⁴

The EPA continues,

“Many of the residents of Lee County rely on surface water from the Powell River for their everyday use. The spill continued for nine days and caused contaminated water to flow through a critical habitat of two federally threatened fish species and nine species of endangered mussels. Over 11, 000 fish were killed, most by suffocation.”⁵

The United States Fish and Wildlife also provides an account of this event, stating:

“On October 24, 1996, a failure in a coal slurry impoundment associated with a coal processing plant owned by LMPI in Lee County, Virginia, resulted in the release of six million gallons of coal slurry to the Powell River watershed. The spill occurred when subsidence in the coal slurry impoundment caused the coal slurry to enter a system of abandoned underground coal mine-works. The coal slurry exited through a mine-works surface portal at Gin Creek, causing the release of the coal slurry into a series of tributaries to the Powell River. “Blackwater,” a mix of water, coal fines, and clay, and associated contaminants, extended far downstream. The coal slurry spill impacted fish, endangered freshwater mussels, other benthic organisms, supporting aquatic habitat, and designated critical habitat for two federally listed fish.

³ “Mining Company Admits to Criminal Negligence-Special Restitution Project Will Help Improve Water Quality to St. Charles, Va., United States Environmental Protection Agency, Region 3 Press Release, November 1, 1999, 00-45, <http://yosemite.epa.gov/r3/press.nsf>

⁴ Id.

⁵ Id.

Federally listed bats and migratory birds may have also been affected acutely due to a loss of a food supply, and chronically due to possible accumulation of contaminants through the food chain.”⁶

Here it is worth mentioning that Lone Mountain Processing, Inc. appears to be a member of the Group seeking to roll back aquatic designated uses in Straight Creek. CBF finds it appalling that a polluter would be brazen enough to seek lower water quality standards in the very stream it played a part in damaging.

Looking closely at operations that discharge to Straight Creek, the TMDL report noted 49 mining operations authorized to discharge into Straight Creek under National Pollutant Discharge Elimination System (NPDES) permits issued by the Department of Mines, Minerals and Energy (DMME). These mining operations have “sludge ponds” that collect and treat surface runoff from the mining site. Current permits for these facilities do not include any limits for Total Dissolved Solids (TDS) and only places limits on Total Suspended Solids (TSS).

9. UNDER THE LAWS OF VIRGINIA, THE COMMONWEALTH IS UNDER NO OBLIGATION TO MOVE FORWARD WITH A REQUEST FOR A UAA.

Section 62.1-44.17 reads,

“If an Group presents to the Board reasonable grounds indicating that the attainment of the designated use for a water is not feasible, then **the Board**, after public notice and at least 30 days provided for public comment, **may allow** the Group to conduct a use attainability analysis according to criteria established pursuant to the Clean Water Act and a schedule established by the Board.”

It should not escape mention that the decision of whether or not to allow a private party UAA remains solely within the discretion of the Board. Nothing within the law compels or requires the Board to allow the private party to conduct the UAA. This is even true if the private party proves it has reasonable grounds indicating unattainability beyond the shadow of a doubt. Regardless, of how well the private party makes its case, the Board is still squarely within its rights to deny the private party the ability to conduct a UAA if the denial of a UAA furthers the goals and duties of the Commonwealth to protect the public trust.

⁶ Notice of Availability of Draft Restoration Plan and Environmental Assessment for the Lone Mountain Processing, Inc.; Coal Slurry Spill Natural Resource Damage Assessment in Lee County, VA, Federal Register Volume 68, Number 24, Page 5911-5912, February 5, 2003.

10. WHERE CONFLICTS OF INTEREST EXIST THE COMMONWEALTH SHOULD CONDUCT THE UAA.

CBF feels strongly that in some cases the Board should not allow a private party to conduct a UAA. In cases where the conflict of interest of between the private party and the health of the water body retards the private party, or its paid consultant, from objectively completing the UAA such that the purposes and benefit of the entire Commonwealth is not sufficiently served, the Board must not allow the third party to move forward even if the private adequately carries its required burden of proof. Instead, the Commonwealth should either make a determination either that the current designated use remains in place or that the UAA should be conducted by an unbiased agency or contractor of the state.

In the present case, CBF finds that the Group has a direct conflict of interest with the restoration and preservation of the aquatic use of Straight Creek. As noted in the TMDL and in prior sections of this document, the aggrieved parties are responsible for several coal sludge spills into Straight Creek that the EPA has clearly found to have played a part in the impairment of the water body. CBF feels such incidents place the private party directly at odds with the need for a scientifically unbiased and objective UAA. For these reasons, CBF respectfully requests the Board to deny the Group the option of conducting a UAA in Straight Creek.

CLOSING COMMENTS

The waters of Straight Creek are for the shared use of the 1,353 citizens of the Straight Creek Watershed, the Group, and all others stakeholders in the TMDL. CBF finds that the Group has failed to adequately carry its burden of proof to show that the attainment of the designated use of Straight Creek is not feasible. Until objective and factual evidence is provided by the Group, CBF requests the Board to deny the Group permission to conduct a private party UAA.

As an advocate for clean water, CBF has a duty to represent its members for the fullest benefit of the cause. To that end, CBF will engage all the resources at its command to defend and uphold the mission of the organization. However, CBF believes that adversarial positions often yield negative results for all parties involved. While these statements may appear to be in stark contrast the comments and assertions made elsewhere in this document, CBF firmly believes that by working together and sharing our concerns, as well as information, before locking ourselves into antithetical positions, that a workable and reasonable solution can be found for Straight Creek. By working openly and honestly with each other from the outset, CBF believes we can reduce the costs, delays, and negative results normally incurred in matters such as one before us. As we proceed ahead, CBF believes some or all of the parties in this matter should meet to

attempt to craft a real and creative solution for the corporations, stockholders, workers, citizens, and resources that use or depend on Straight Creek.

Thank you for opportunity to review and comment on the Group's request to conduct a UAA. If you have any questions or would like to discuss our comments further, please feel free to contact me at (804) 780-1392.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph J. Tannery". The signature is fluid and cursive, with the first and last names being more prominent.

Joseph J. Tannery
Virginia Staff Attorney

cc: Ann Jennings, Executive Director, CBF
Mike Gerel, Staff Scientist, CBF